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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

21 EON CORP. IP HOLDINGS, LLC,) Case No. 3:12-cv-01011-JST
22 Plaintiff,) Assigned to: Jon S. Tigar
23 v.)
24 SENSUS USA INC., et. al.,) **DEFENDANTS' NOTICE OF MOTION**
25 Defendants.) **AND MOTION FOR ATTORNEYS'**
26) **FEES AND SANCTIONS**
27) Hearing Date: July 24, 2014
28) Time: 2:00 PM
29) Courtroom: 9, 19th Floor
30) Hon. Jon S. Tigar
31)
32)

33 **NOTICE OF MOTION AND MOTION**

34 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

35 PLEASE TAKE NOTICE that on Thursday, July 24, 2014 at 2 p.m. before the Honorable
36 Jon S. Tigar, in Courtroom 9 of the United States District Court of the Northern District of
37 California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, CA 94102,
38 Defendants United States Cellular Corporation, Cisco Systems, Inc., Sprint Spectrum L.P., HTC
39 America, Inc., Motorola Mobility LLC and Motorola Solutions, Inc. ("Defendants") will and

1 hereby do move the Court to award Defendants attorneys' fees and sanctions.

2 This motion is made pursuant to 35 U.S.C. § 285, 28 U.S.C. § 1927, and this Court's
3 inherent authority to sanction. It is based on this Notice of Motion and Motion, the attached
4 Memorandum of Points and Authorities, the declarations of Ashish Nagdev, Bryan K. Anderson, L.
5 Norwood Jameson, Fred I. Williams, John J. Cotter, Steve Moore, all matters of which this Court
6 takes judicial notice, this Court's file in this matter, and any other evidence and argument as may
7 be presented at the hearing on the Motion.

8 By this motion, Defendants seek to recover their attorneys' fees incurred since August 1,
9 2013 and an award of sanctions in the form of their expert witness expenses due to Plaintiff's
10 unreasonable pursuit of this case following this Court's dispositive claim construction ruling.

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1 **I. INTRODUCTION**

2 Defendants seek (i) to recover their attorneys' fees incurred since August 1, 2013¹ and (2)

3 an award of sanctions in the form of their expert witness expenses, because EON unreasonably

4 pursued this case for almost a year following this Court's dispositive claim construction ruling.

5 There is no justifiable basis for EON to have believed it could establish infringement in light of the

6 Court's construction of the conditional "if" limitations and the undisputed operation of the accused

7 "subscriber units" and accused femtocells. Rather than take the only reasonable course and accept

8 Defendants' offer of a stipulated judgment to pursue an appeal, EON disregarded this Court's

9 explicit ruling that "[n]othing in the claims, or in the specification, contemplates a role for the user

10 in affirmatively selecting one path over another," (ECF No. 748 at 28), by resting its entire

11 infringement theory on users manually selecting one path over another. EON also continued to

12 pursue its infringement theories based on third party web servers, like Google and Facebook

13 servers, that EON contended were "network hub switching centers" despite this Court's explicit

14 ruling that a "network hub switching center" is *not* "broad enough to encompass a switching center

15 that serves any cells anywhere in the world." *Id.* at 20.

16 EON's misbehavior in this case is more than sufficient basis for the Defendants' request for

17 attorneys fees and sanctions. EON's apparent motivation in prolonging this case regardless of the

18 merits both explains EON's unwarranted positions and provides further evidence supporting this

19 motion. In July, 2013, EON had seven cases pending in which the '491 patent was asserted.² If

20 EON had agreed to final judgment in this case, then those other cases may have been stayed or

21 even extinguished under the doctrine of collateral estoppel.³ Instead of risking its sole patent

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23 ¹ Defendants intend to seek fees and expenses through the full prosecution of this motion. *See Micromesh Tech. Corp. v. Am. Rec. Prods.*, No. C-06-6030 MHP, 2007 U.S. Dist. LEXIS 64241, at *29 (N.D. Cal. Aug. 30, 2007) (finding fees incurred in prosecuting the fees and costs motions are recoverable under § 285).

24 ² *EON Corp. IP Holdings, LLC v. Landis+Gyr Inc. et al.*, 6:11-CV-00317, (E.D. Tex. Jun 17, 2011); *EON Corp. IP Holdings, LLC v. AT&T Mobility LLC*, 3:11-CV-01555, (D.P.R. Jun 14, 2011); *EON Corp. IP Holdings, LLC v. LG Elecs. Mobilecomm USA, Inc.*, 6:12-CV-00941, (E.D. Tex. Dec 19, 2012); *EON Corp. IP Holdings, LLC v. Pantech Wireless, Inc.*, 6:12-CV-00942 (E.D. Tex. Dec 19, 2012); *EON v. Apple Inc.*, 6:12-CV-00943, (E.D. Tex. Dec. 19, 2012); *EON Corp. IP Holdings, LLC v. Asustek Computer Inc.*, 6:12-CV-00944, (E.D. Tex. Dec 19, 2012); *EON Corp. IP Holdings, LLC v. MetroPCS Commc'nns, Inc. et al.*, 2:12-CV-00633, (E.D. Tex. Oct 02, 2012).

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27 ³ *See In re Freeman*, 30 F.3d 1459, 1466-67 (Fed. Cir. 1994) (if claim interpretation of prior action is the reason that patent holder lost prior action and the product was found to be non-infringing, then claim interpretation was necessary to the final decision of the prior action, and would be given preclusive effect in the second action).

1 litigation business, EON chose to buy time by flouting this Court’s *Markman* ruling, without any
 2 regard for the substantial fees and costs Defendants would necessarily incur in order to obtain the
 3 inevitable judgment. EON’s conduct resulted in a needless and wasteful multiplication of
 4 proceedings that included unnecessary fact discovery, including numerous depositions throughout
 5 the United States, preparation of expert reports and expert depositions, and summary judgment
 6 practice.

7 As a result, EON’s unreasonable misbehavior and abuse of judicial process must be
 8 sanctioned under 35 U.S.C. § 285, 28 U.S.C. § 1927, and this Court’s inherent authority.

9 **II. LEGAL STANDARD**

10 **A. Attorneys’ Fees May Be Awarded Under 35 U.S.C. § 285 for Any Case that
 11 “Stands Out from Others” Considering the “Totality of the Circumstances”**

12 The United States Supreme Court recently explained the proper standard for assessing
 13 whether a case is “exceptional” for purposes of awarding attorneys’ fees pursuant to 35 U.S.C.
 14 § 285. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749, 1756 (2014).
 15 Specifically, the Court rejected a standard that would require a showing of both subjective bad faith
 16 and exceptionally meritless claims, and cautioned district courts to consider the “totality of
 17 circumstances” and award attorney fees in any cases that “stand[] out from others with respect to
 18 the substantive strength of a party’s litigating position (considering both the governing law and the
 19 facts of the case) or the unreasonable manner in which the case was litigated.” *Id* at 1756. The
 20 Supreme Court also made clear that a patent litigant may establish entitlement to fees “by a
 21 preponderance of the evidence standard” that “allows both parties to share the risk of error in
 22 roughly equal fashion.” *Id.* at 1758 (internal citations and quotation marks omitted). The related
 23 Supreme Court decision in *Highmark* recognizes that the largely factual determination of whether a
 24 case is “exceptional” is reviewed on appeal for an abuse of discretion. *Highmark Inc. v. Allcare*
 25 *Health Mgmt. Sys.*, 134 S.Ct. 1744, 1749 (2014).

26 While the Supreme Court did not adopt a specific test or standard under § 285 to determine
 27 what constitutes an “exceptional” case, the Court pointed approvingly to the “holistic, equitable”
 28 approach applied by the Federal Circuit prior to *Brooks Furniture Mfg. v. Dutalier Int’l, Inc.*, 393

1 F.3d 1378, 1381 (Fed. Cir. 2005). Under this approach, vexatious, unjustified, or otherwise bad
 2 faith litigation may prove the existence of an exceptional case. *Phonometrics, Inc. v. Westin Hotel*
 3 *Co.*, 350 F.3d 1242, 1246 (Fed. Cir. 2003). Bad faith may be proved circumstantially, including
 4 because the patentee is “manifestly unreasonable in assessing infringement.” *Id.* (citation omitted)
 5 (approving the district court’s finding of exceptionality where plaintiff continued to press its
 6 infringement action knowing that it could not accuse the defendant of violating the patent as the
 7 claims had been previously defined).

8 Even under the heightened and now-invalidated *Brooks Furniture* standard, pursuit of
 9 infringement allegations based on mischaracterizations of or failure to apply the Court’s claim
 10 constructions is a proper basis to award attorneys’ fees under § 285. *See MarcTec, LLC v. Johnson*
 11 & *Johnson*, 664 F.3d 907 (Fed. Cir. 2012) (finding that plaintiff had engaged in litigation
 12 misconduct where, *inter alia*, MarcTec decided to advance frivolous and unsupported allegations
 13 of infringement premised on mischaracterizations of the claim constructions adopted by the trial
 14 court); *Cartner v. Alamo Group, Inc.*, No. 1:7 CR 01589, 2011 U.S. Dist. LEXIS 108497, at *13-
 15 14 (N.D. Ohio Sept. 23, 2011) (plaintiff’s infringement allegations were frivolous and supported
 16 the finding of an exceptional case when plaintiff continued to assert an infringement theory post-
 17 *Markman* order that relied on a construction of a claim term that the Court had specifically
 18 rejected). Threats of early summary judgment motion practice by the alleged infringer, and a
 19 subsequent failure by the patentee to investigate whether its positions were legally tenable, may
 20 support a showing of bad faith. *Lakim Indus. v. Linzer Prods. Corp.*, No. 2:12-cv-04976, 2013
 21 U.S. Dist. LEXIS 58958, *19 (C.D. Cal. Apr. 24, 2013) (“The record also establishes that Quali-
 22 Tech was aware of its perceived substantive shortcomings because it was faced with an early
 23 summary-judgment motion. This at least suggests that Quali-Tech should have paused to further
 24 investigate whether its positions were legally tenable.”). All of these factors are present in this
 25 case.

26 **B. The Court May Also Award as a Sanction Expert Witness Fees a Movant Was
 27 Forced to Incur as a Result of Patentee’s Bad Conduct**

28 In addition to awarding Defendants’ attorneys’ fees under Section 285, this Court has

1 inherent authority to sanction EON. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991) (a district
 2 court has the inherent power to sanction parties for litigation misconduct); *see also Amstead Indus.*
 3 *Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 379 (Fed. Cir. 1994). This power is not displaced
 4 by statutes that otherwise provide for specific sanctions. *Chambers*, 501 U.S. at 42-43 (finding that
 5 neither 28 U.S. § 1927 nor the Federal Rules of Civil Procedure prevent the exercise of, or
 6 otherwise obviate, the district court's inherent power to sanction). A district court's exercise of its
 7 inherent power to sanction is reviewable for an abuse of discretion. *Id.* at 55; *see also Amstead*, 23
 8 F.3d at 379; *Takeda Chem. Indus., Ltd. v. Mylan Labs, Inc.*, 549 F.3d 1381, 1390 (Fed. Cir. 2008).

9 Where a district court finds “fraud or abuse of the judicial process,” it may “invoke its
 10 inherent sanctioning power to impose expert witness fees[].” *Amstead*, 23 F.3d at 378; *see also*
 11 *MarcTec*, 664 F.3d at 921. Absent such conduct, “courts may use sanctions in cases involving bad
 12 faith that cannot be otherwise reached by rules or statutes” to award expert fees. *Takeda*, 549 F.3d
 13 at 1391. (citing *Chambers*, 501 U.S. at 46); *see also iLor, LLC v. Google, Inc.*, 631 F.3d 1372,
 14 1380 (Fed. Cir. 2011). An award limited to attorneys’ fees may be insufficient to sanction a
 15 malefactor, particularly where the moving party was forced to incur expert fees as a result of the
 16 sanctionable behavior. *See Marctec*, 664 F.3d at 921 (awarding expert fees as a sanction based on
 17 the same conduct used to award attorneys’ fees because movant was forced to incur expert fees as a
 18 result of bad conduct).

19 **C. The Court May Also Sanction Counsel for Reckless or Knowing Pursuit of a**
 20 **Frivolous Argument Under 28 U.S.C. § 1927**

21 Finally, “[a]n attorney who so multiplies the proceedings in any case unreasonably and
 22 vexatiously may be required by the court to satisfy personally the excess costs, expenses, and
 23 attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. Sanctions under
 24 § 1927 may be assessed when an attorney knowingly or recklessly and in bad faith raises a
 25 frivolous argument. *Estate of Blas ex rel. Chargualaf v. Winkler*, 792 F.2d 858, 860 (9th Cir.
 26 1986). Sanctions under § 1927 do not require that a filing be entirely frivolous, so long as a
 27 finding or bad faith intention to harass or recklessness is made. *In re Keegan Mgmt. Co. Secs.*
 28 *Litig.*, 78 F.3d 431, 435 (9th Cir. 1996). A Court may award fees under both 35 U.S.C. § 285 and

1 28 U.S.C. § 1927. *Phonometrics*, 350 F.3d at 1242.

2 **D. Attorneys' Fees in the Ninth Circuit Are Determined Using a "Lodestar" Analysis**

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4 "In the Ninth Circuit, reasonable attorneys' fees are determined by first calculating the
 5 'lodestar.'" *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 2 No. C 08-04567, 2012 U.S. Dist.
 6 LEXIS 5109, at *6 (N.D. Cal. Jan. 17, 2012). The Court "determine[s] the presumptive lodestar
 7 figure by multiplying the number of hours reasonably expended on the litigation by the reasonable
 8 hourly rate." *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993); *see also Ballen v.*
 9 *City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d
 10 973, 978 (9th Cir. 2008). "There is a strong presumption that the lodestar figure represents a
 11 reasonable fee." *Monolithic Power Sys.*, 2012 U.S. Dist. LEXIS 5109, at *6. The district court
 12 may adjust this presumptively reasonable attorneys' fees amount based only on the following
 13 factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill
 14 requisite to perform the legal services properly; (4) the preclusion of other employment due to
 15 acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the
 16 limitations imposed by the client or the case; (8) the amount involved and the results obtained; (9)
 17 the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the
 18 nature of the professional relationship with the client; and (12) awards in similar cases. *Intel*
 19 *Corp.*, 6 F.3d at 622 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975).

20 In determining a reasonable hourly rate, courts look to the forum in which the district court
 21 sits and the prevailing market rate in that community for similar work performed by attorneys of
 22 comparable skill, experience and reputation. *Santiago v. CACH LLC*, No. 13-cv-02234, 2013 U.S.
 23 Dist. LEXIS 157809, at *14 (N.D. Cal. Nov. 4, 2013). "If the applicant satisfies its burden of
 24 showing that the claimed rate and number of hours are reasonable, the resulting product is
 25 presumed to be the reasonable fee". *Intel Corp.*, 6 F.3d at 623. In establishing the hourly rate, the
 26 court may take into account: (1) the novelty and complexity of the issues; (2) the special skill and
 27 experience of counsel; (3) the quality of representation; and (4) the results obtained. *Cabral v.*
 28 *County of Los Angeles*, 864 F.2d 1454, 1464 (9th Cir. 1988).

1 **III. ARGUMENT**

2 The totality of the circumstances demonstrates that EON unreasonably and frivolously
 3 continued to pursue this case despite this Court's *Markman* ruling. Any reasonable patentee would
 4 have recognized that it could not prevail on infringement and would have stipulated to a judgment
 5 of non-infringement to pursue an appeal of the claim construction ruling in July, 2013, when this
 6 Court's *Markman* order issued. Instead, EON and its counsel abused the judicial process and
 7 imposed unjustified burdens and expenses on each Defendant.

8 **A. EON Knew Defendants' Proposed Claim Construction Was Case Dispositive**

9 During claim construction exchanges and briefing, Defendants proposed a construction for
 10 the conditional "if" limitations that made clear that handsets that preferentially connect to Wi-Fi
 11 could not infringe. (See ECF No. 748 at 24-25). EON admitted as much during claim construction
 12 briefing when it stated that Defendants' proposed constructions for the conditional "if" limitations
 13 were "a direct statement of non-infringement" and "seek to avoid infringement by adding a timing
 14 requirement (a 'present condition') to the claims." (ECF No. 654 at 1-6). At the claim
 15 construction hearing, Defendants again were clear that they sought a construction that avoided any
 16 ambiguity as to the user's role in selecting the communication path. *See* Declaration of Ashish
 17 Nagdev In Support of Defendants' Motion for Attorneys' Fees ("Nagdev Decl."), Ex. 1
 18 (Defendants' Claim Construction Presentation) at pp. 9-46. In response, EON told this Court,
 19 "[t]he defendants are trying to impose a whole bunch of negative limitations into that condition to
 20 circumscribe the circumstances under which infringement occurs." (ECF No. 717 at 65:20-22).

21 Similarly, for the "network hub switching center" limitation, during briefing EON said that
 22 Defendants' proposed construction "is not about the meaning of the term; it is about whether
 23 [d]efendants infringes[sic]." (ECF No. 654 at 11). And at the hearing, EON expressed concern
 24 with Defendants' proposed construction as being too concerned with non-infringement of the
 25 accused devices. (ECF No. 717 at 33:20-24).

26 **B. EON Knew the Court's *Markman* Ruling Was Case Dispositive**

27 On July 8, 2013, this Court decided in favor of Defendants on the conditional "if" and
 28 "network hub switching center" limitations, among others. (ECF No. 748 at 26-31). In relevant

1 part, this Court held that the conditional “if” limitations are binary, meaning the accused subscriber
 2 units can *either* communicate with the cellular network (Path A) or the Wi-Fi access point (Path
 3 B). (*Id.* at 27, 30). This Court also held that communication by the subscriber unit with the Wi-Fi
 4 access point is conditioned on the subscriber unit being unable to directly communicate with or not
 5 receiving a signal from the cellular network. (*Id.* at 28, 31). In response to EON’s assertion that
 6 the claims could be construed to permit users to select the communication path, the Court also
 7 clearly stated, “[n]othing in the claims, or in the specification, contemplates a role for the user in
 8 affirmatively selecting one path over another.” (*Id.* at 28). Similarly, the Court resolved the
 9 parties’ dispute about whether the scope of the claims extended to the user responding to
 10 “situations in which communication was impaired in the past” and found that “[t]he claims only
 11 recite present-tense conditions” and that “it makes no sense to link the capability of transfer to an
 12 inability to communicate that happened at an undefined time in the past.” (*Id.* at 27-28).

13 This Court also clearly addressed whether the “network hub switching center” as properly
 14 construed could encompass third party web servers, such as Google, Yahoo!, and Facebook
 15 servers. “EON seems to be maintaining that the scope of this term is broad enough to encompass a
 16 switching center that serves any cells anywhere in the world, even those completely unrelated to
 17 the network...[T]his is not the appropriate ‘understanding of what the inventors actually invented
 18 and intended to envelop with the claim.’” (ECF No. 748) at 20; *see also id* at 19 (“This very
 19 strongly indicates that the switching center serves those units that are part of the network.”). EON
 20 sought reconsideration of this Court’s “network hub switching center” construction, but that
 21 request was denied. (ECF No. 873).

22 C. Without Any (Valid) Reason, EON Avoided Appeal

23 The Court’s claim construction voided all of EON’s infringement theories and effectively
 24 ended this case. Based on EON’s statements both before and after the *Markman* ruling, EON
 25 acknowledged as much. Before the ruling, EON characterized Defendants’ claim construction
 26 position as one that, if adopted, would require a finding of non-infringement. After the *Markman*
 27 ruling, EON admitted that the “landscape of the case” had changed. EON should have conceded
 28 non-infringement based on the Court’s claim constructions and appealed, but instead forged ahead

1 in order to preserve its claims in parallel litigations.

2 At the July 11, 2013 case management conference four days after the ruling, EON admitted
 3 that “the claim construction order obviously changes the landscape of the case, and EON has to go
 4 back and evaluate its infringement cases against each individual defendant and make a
 5 determination as to how to proceed in light of the Court’s [*Markman*] order” (ECF No. 752, at
 6 32:7-32:11). In the meantime, on July 10, 2013, Defendants requested that EON stipulate to non-
 7 infringement of all asserted claims so that final judgment could be entered. (ECF No. 762 at 3).
 8 EON’s acceptance of Defendants’ proposal was the only reasonable course given the *Markman*
 9 ruling and the undisputed “Wi-Fi preference” operation of the accused “subscriber units.” In other
 10 words, the only place for EON to seek recourse for its disagreement with this Court’s case
 11 dispositive claim construction was the Federal Circuit. However, at the July 10 status conference
 12 EON signaled its eventual choice of delay over reason by requesting that the Court “hold in
 13 abeyance an issue of a scheduling order to allow” it an opportunity to respond to Defendants’ email
 14 “and propose our view of the world and how we would like to go forward, and that will be
 15 precipitated back and forth between the defendants and the plaintiff about how the case goes
 16 forward procedurally and substantively.” (ECF No. 752 at 33:23-24, 34:3-6). When the Court
 17 refused EON’s request (*id* at 33:23-24, 34:3-6, 34:16-19, 35:14-21), EON waited over a month,
 18 until August 16, 2013, before refusing to stipulate to final judgment of non-infringement. (ECF
 19 No. 769 at n.3).

20 **D. EON Forced Defendants to Complete Irrelevant Fact and Expert Discovery**

21 After EON refused its only reasonable option to pursue an appeal, on August 26, 2013,
 22 Defendants asked this Court to stay discovery and to set an expedited schedule for summary
 23 judgment motions. (ECF No. 762 at 5). EON opposed, instead proposing that it would “update”
 24 its infringement contentions with the “claims and products still at issue.” (ECF No. 769 at 3).
 25 EON further represented that “its amended contentions will provide the requisite notice for
 26 Defendants as to how each of the accused products operate, alone or in combination with others, in
 27 an infringing manner under this Court’s constructions.” (*Id.*). At the status conference on
 28 September 24, 2013, this Court denied any request to modify the schedule or stay the case pending

1 resolution of summary judgment, instead asking the parties to work within the framework of the
 2 agreed upon schedule. (ECF No. 784).

3 On the same day as the September 24, 2013 status conference, EON sought leave to file a
 4 motion for reconsideration of the claim construction ruling. (ECF No. 783). Critically, EON did
 5 not ask this Court to reconsider or clarify the conditional “if” constructions. (ECF No. 783). If
 6 there was any ambiguity in the construction with respect to user involvement, EON should have
 7 requested the Court to reconsider or clarify the construction of the conditional “if” limitations. But
 8 EON did not. (ECF No. 783). Instead, EON’s motion on the “switching means” element made
 9 abundantly clear that the Court’s prior *Markman* ruling that “[n]othing in the claims, or in the
 10 specification, contemplates a role for the user in affirmatively selecting one path over another” was
 11 indisputably correct. (ECF No. 1029 at 10-11).

12 On October 4, 2013, nearly three months after the *Markman* ruling, days after the status
 13 conference, and over a month after it proposed to serve amended contentions, EON served
 14 amended infringement contentions, but it did not alter its theory of infringement on the conditional
 15 “if” limitations or remove any accused products. (ECF No. 789).⁴ Instead, other than ministerial
 16 edits, EON attempted to add internet based data centers, such as Google data centers, to its
 17 contentions for the “network hub switching center” claim limitation. (ECF No. 843 at 3-4). It also
 18 proposed that cellular network contracts with third parties established that third party internet based
 19 servers can act as a “network hub switching center.” *Id* at 4. As Defendants noted at the time,
 20 EON’s proposed amendments simply “reiterate[d] that EON [was] standing by the same old
 21 infringement theories that it … pursued since long before the Court’s *Markman* Order” and that it
 22 had not in fact responded to the Court’s claim constructions, which were different from those
 23 offered by EON. (ECF No. 796 at 5). This Court rejected EON’s proposed amendments as largely

24

25 ⁴ Specifically, despite the Court’s claim construction, EON continued to contend that the “unable to communicate”
 26 condition could result from “a user turning off cellular data or configuring her device to automatically associate with a
 27 Wi-Fi device in range because communication had been and may be expected to still be impaired.” (See, e.g., ECF No.
 28 789-6 (Exhibit 5 to the Declaration of John V. Picone in Support of Plaintiff EON’s Motion for Leave to Amend its
 Infringement Contentions) at 19). EON also continued to assert that the condition of “not receiving a signal” for
 purposes of the method claims could result due to “a user turning off cellular data or configuring his device to
 automatically associate with a Wi-Fi device in range because communication had been and may be expected to still be
 impaired.” (See, e.g., *id.* at 22).

1 immaterial, untimely, irrelevant, and, with respect to the network hub switching center
 2 amendments, prejudicial to Defendants. (ECF No. 843 at 4-5).

3 Despite the *Markman* ruling, EON’s telling motion for reconsideration, and EON’s failure
 4 to provide amended infringement contentions that properly responded to the Court’s claim
 5 constructions, EON subsequently forced Defendants to respond to substantial fact discovery
 6 (including discovery on products that EON ultimately dropped when it served its expert reports)⁵
 7 while ignoring any documents and evidence that the accused products did not operate in the
 8 manner claimed, as construed by the Court: *i.e.*, that the accused handsets preferentially connect to
 9 the macro cellular network (the “local base stations”) over Wi-Fi or the femtocells (the “modems”).

10 First, EON already had in its possession prior to issuance of the Court’s claim construction
 11 order documents and testimony conclusively demonstrating that if Defendants prevailed in their
 12 proposed claim constructions, EON’s infringement claims must fail. For example, EON’s
 13 productions included documents showing that a mobile phone would “automatically detect and use
 14 [femtocells] in preference to … outdoor cellsites” and that femtocells looked like mini cell-towers
 15 to the accused handsets. *See* Nagdev Decl., Ex. 2. In addition, fact witness testimony
 16 unequivocally established that the accused subscriber units prefer Wi-Fi to cellular connections.
 17 For example, before claim construction briefing had concluded, Satish Kulkarni, a Motorola
 18 engineer, testified that Motorola phones prefer Wi-Fi to cellular by default. *See, e.g.*, Nagdev
 19 Decl., Ex. 3 (Kulkarni Dep. Tr., Feb. 26, 2013) at 44:24-45:4.

20 Nonetheless, following this Court’s *Markman* order, EON served on each Defendant
 21 dozens of corporate deposition topics, interrogatories, requests for production, and requests for
 22 admission. *See* Nagdev Decl. at ¶ 3. Meanwhile, EON avoided a direct response from Defendants
 23 on a key infringement issue, seeking no discovery specifically targeted at the issue of whether the
 24 accused “subscriber units” preferentially connected to the accused “local base station repeater cell”
 25 rather than the accused “modems” and instead simply asking a generic request that Defendants

26 _____
 27 ⁵ For example, EON originally identified at least ten different Cisco products as meeting the “network hub switching
 28 center” claim limitation, and over fifty different products as meeting the “modem” limitation. (*See generally* ECF No.
 632-3). Ultimately, however, EON dropped its infringement case against Cisco as to all products except the Cisco
 femtocell. (*See* ECF No. 924 at 5-6).

1 describe their respective non-infringement contentions. *See* Nagdev Decl., Ex. 4, Interrog. No. 1.
 2 The Defendants' respective responses again made clear that none of the accused "subscriber units"
 3 met the conditional "if" limitations as construed by the Court. *See* Nagdev Decl., Ex. 5 (Response
 4 to Interrogatory No. 1) at 3:17-22.

5 EON further imposed unjustified costs and burdens by demanding that each Defendant
 6 make multiple corporate designated witnesses available for multiple days, resulting in preparation
 7 meetings with multiple 30(b)(6) witnesses on a huge number of topics, when EON had no intention
 8 of seriously pursuing these vast number of topics. *See* Nagdev Decl., Exs. 6-8. Indeed, these
 9 depositions did not cover the topics noticed or last multiple days, but instead lasted only a few
 10 hours total. *See* Nagdev Decl., Exs. 9-11. For example, EON deposed U.S. Cellular's technical
 11 witness Mr. Zernick for only one hour, and EON never once asked any question focused on the
 12 conditional "if" limitations. *See* Nagdev Decl., Ex. 10 (Zernick Dep. Tr., Nov. 13, 2013).
 13 Nevertheless, Mr. Zernick's testimony confirmed that all accused handsets were Wi-Fi preferred.
 14 Nagdev Decl., Ex. 10 at 45:8-15. EON's deposition of Cisco's proffered 30(b)(6) witness on
 15 technical topics similarly lasted only a few hours and, in that deposition, Cisco's witness confirmed
 16 that "irrespective of whether there is a complete macro [cellular] coverage or there is minimal
 17 macro coverage ... if the end-user device is closely associated with the femtocell, it will register
 18 with the femtocell." *See* Nagdev Decl., Ex. 12 (Nanjanagud Dep. Tr., Nov. 19, 2013) at 49:23 –
 19 50:3. EON's deposition of HTC's proffered 30(b)(6) witness on technical topics similarly lasted
 20 only a few hours and, in that deposition, HTC's witness confirmed that the HTC devices favor Wi-
 21 Fi without regard to the cellular network signal. (*See* ECF No. 927-1 at 21 ("Q: [D]oes the HTC
 22 handset sets sold in the United States . . . signal prioritization favoring Wi-Fi have anything to do
 23 with the strength of the cellular network signal? A: No.")). EON ignored this testimony, as well
 24 as Defendants' responses to EON's discovery requests in November 2013 that the accused
 25 networks and devices did not operate in the manner that the '491 Patent claimed.⁶

26 In contrast to EON's indifference to the operation of the accused handsets and the accused

27 ⁶ For example, Cisco responded to EON's Common Interrogatory 1 that "the accused networks are designed such that
 28 the accused mobile devices prefer to use Wi-Fi or femtocells (i.e., 'Path B') over cellular paths (i.e., 'Path A') ... [and]
 the accused femtocells are cellular base stations and cannot satisfy the 'modem' limitation of the claims."

1 femtocells, Defendants asked EON whether it had any evidence to support a claim that the accused
 2 handsets would ever preferentially connect to cellular rather than Wi-Fi and on whether EON had
 3 any evidence to support a claim that the accused handsets would preferentially connect to the
 4 macro cellular network rather than a femtocell. (ECF No. 925 at ¶¶ 6-10). EON's response was
 5 that "EON is without sufficient information or knowledge to admit or deny this request, and
 6 therefore denies this request." (*Id.*) In other words, EON had no factual basis for pursuing its
 7 infringement claims after the Court's claim construction. Likewise, in response to discovery
 8 seeking EON's support for its contention that each accused product and service meets the "network
 9 hub switching center" claim limitation, EON simply responded that it would respond through its
 10 expert report on infringement. Nagdev Decl., Ex. 13.

11 **E. No Reasonable Patentee Would Pursue EON's "Phone Under The Bed"
 12 Infringement Theory**

13 On December 11, 2013, EON submitted its expert infringement and damages disclosures.
 14 (ECF No. 942-1, Exhs. E, F). These opinions failed to raise any evidence that the accused handsets
 15 ever operated in a mode that preferred the macro cellular network rather than femtocells or Wi-Fi.
 16 Instead, EON pursued what the Court had clearly stated was out of bounds – users affirmatively
 17 selecting one path preferentially rather than another, including by responding to situations in which
 18 communication was impaired in the past, as opposed to the present. (ECF No. 947 at 8-9, 13-14;
 19 Nagdev Decl., Ex. 14 (Lyon Cisco Report) at 116 ("I conclude that the 'determining step' is
 20 generally performed by the MNO's subscriber, who determines that no satisfactory macro cellular
 21 radio signal is present within her premise ... After making such a determination the user then takes
 22 the next steps of requesting the femtocell from her MNO and ... connect[ing] the femtocell to her
 23 broadband modem for Internet access.")). EON also continued to pursue general internet servers as
 24 the claimed network hub switching centers, another theory that was explicitly rejected by this
 25 Court in its *Markman* order and order denying in part EON's motion for leave to file a motion for
 26 reconsideration. (ECF No. 947 at 22-25).

27 That the merits of this case failed to factor into EON's decision to push forward is also
 28 evident from the other positions advocated by EON's experts. In order to "demonstrate"

1 infringement, EON’s technical expert, Dr. Lyon, had to find a hotel room in Eureka California
 2 where, in one portion of the room he could not receive a cellular signal on a handset, while in
 3 another portion of the same room he could receive a cellular signal on a mobile hotspot (an alleged
 4 “modem”). Nagdev Decl., Ex. 32 at ¶¶ 247-292). Dr. Lyon could then have a handset lacking a
 5 cellular connection connect by Wi-Fi through either a mobile hotspot connected to a cellular base
 6 station, or a Wi-Fi access point that connected to the internet over Ethernet to Google (EON’s
 7 network hub switching center). Other than this highly artificial scenario, Dr. Lyon was unable to
 8 identify any other incidents that met his test for infringement. Nagdev Decl., Ex. 15 (Lyon Dep.
 9 Tr., Feb. 21, 2014) at 12:14-14:2. Also, Dr. Lyon admitted that when he strayed into an area of
 10 cellular coverage, the handset would nevertheless continue to use Wi-Fi. Nagdev Decl., Ex. 16
 11 (Lyon Dep. Tr., Feb. 19, 2014) at 194:4-195:7.

12 With respect to the accused Cisco femtocells, Dr. Lyon admitted that he had never
 13 performed any testing of the accused femtocells’ operation. *See* Nagdev Decl., Ex. 17 (Lyon Dep.
 14 Tr., Feb. 20, 2014) at 82:22-85:16. The only acts of infringement with a femtocell that Dr. Lyon
 15 could offer were ones in which the subscriber “chose to buy and install a femtocell in their house
 16 because the subscriber knew that they had no signal within the house,” and wherein Dr. Lyon
 17 turned off his femtocell network, went into an area with no cellular service, and then turned the
 18 femtocell network back on. (*See, e.g., id.* at 139:17-144:2; ECF No. 1029 at 12). Both scenarios
 19 were ones that the Court had expressly rejected as within the scope of the claims in the claim
 20 construction order.

21 On damages, EON’s economist, Dr. Nawrocki, valued offloading traffic from the cellular
 22 network of Defendants Sprint and U.S. Cellular in calculating a “reasonable” royalty. (Nagdev
 23 Decl., Ex. 18 (Nawrocki Report for non-Cisco Defendants) at ¶¶ 21-22). He did so despite the fact
 24 that, under Dr. Lyon’s limited infringement scenarios, traffic would never be offloaded from the
 25 cellular network.⁷ If the mobile hotspot “modem” were used, the traffic would go on to the cellular
 26 network. If the Wi-Fi access point were used, the traffic would never go on to the cellular network
 27 because the handset (by Dr. Lyon’s own test requirement) could not have a cellular connection.

28 ⁷ *See* Nagdev Decl. at Ex. 19 (Cox Report), ¶ 191; *see also* Nagdev Decl. at Ex. 20 (Negus Report), ¶ 456.

1 Rather than recognizing defeat and appealing this Court's *Markman* ruling, EON chose to
 2 pursue illusory theories of infringement entirely divorced from its damages theory and forced
 3 Defendants to respond to these theories so EON could delay the literal day of judgment. Once
 4 EON's expert disclosures finally and effectively admitted that the infringement claims failed under
 5 the *Markman* ruling, Defendants promptly filed their motion for summary judgment.

6 **F. Summary Judgment Confirmed That EON's Claims Lacked Any Merit**

7 On February 5, 2014, Defendants filed their motion for summary judgment of non-
 8 infringement based, in part, on this Court's construction of the conditional "if" limitations. (ECF
 9 No. 924). In response, EON remarkably filed its opposition brief that included **no** admissible
 10 evidence to support its infringement theories. (ECF No. 1029 at 7).

11 This Court granted Defendants' motion, finding that there existed no material factual
 12 dispute that "[i]n the accused networks, handsets switch to [Wi-Fi] even when the handset is able
 13 to communicate through [the cellular network], and the accused networks therefore fall outside the
 14 scope of the claims." (*Id.* at 8). This Court again flatly rejected EON's argument that handset
 15 users can satisfy the conditional "if" limitations "when the user is responding to a condition of
 16 cellular nonconnectivity" because:

17 (1) user manual intervention was not a viable infringement theory under the operative
 18 infringement contentions;

19 (2) user manual intervention was contrary to this Court's explicit ruling in its
 20 *Markman* order that "[n]othing in the claims, or in the specification,
 21 contemplates a role for the user in affirmatively selecting one path over
 22 another.;"

23 (3) user manual intervention conflicted with this Court's explicit ruling in its
 24 *Markman* order that "the claims only recite present-tense conditions," and
 25 therefore there is no way for a user to make the determination at the moment
 26 of the switch from "Path A" to "Path B";

27 (4) user manual intervention was "in significant tension with the arguments EON just
 28 recently made" in the switching means reconsideration motion that the

1 subscriber unit is responsible for satisfying the conditional “if” limitations;
 2 and

3 (5) a user’s “brain functions that occur after a cellphone user realizes her calls keep
 4 getting dropped, [and] the phone call the user makes ...” were not part of the
 5 claimed system.

6 (*Id.* at 9-13, 15-18).

7 In addition to the conditional “if” limitations, Defendants also moved for summary
 8 judgment to preclude EON from arguing that third party web servers are “network hub switching
 9 centers” under this Court’s construction. (ECF No. 924). This Court held that the claim
 10 construction order expressly precludes such a reading. (ECF No. 1029 at 19).

11 All of the Court’s reasons for entering summary judgment make clear that at least by the
 12 time of the *Markman* ruling, EON had no reasonable basis to pursue its claims.

13 **G. EON’s Irrelevant and Baseless DOE Argument Was an Improper Delay Tactic**

14 EON’s doctrine of equivalents argument in opposition to summary judgment is another
 15 example of EON’s abuse of the judicial process in an effort to delay judgment in this case. EON
 16 advanced its DOE argument without any legal analysis or support.⁸ (ECF No. 947 at 5-6). EON’s
 17 proffered expert reports also summarily concluded that the differences between the conditional “if”
 18 limitations and the accused products were “insubstantial” without any discussion of user
 19 intervention, thus rendering it irrelevant to Defendants’ summary judgment motion. (ECF No. 948
 20 at Exhs. 3-5).

21 Even had the proffered DOE analysis been relevant, EON’s expert failed to consider the
 22 prosecution history that he admitted is relevant to any DOE analysis. Nagdev Decl., Ex.15 (Lyon
 23 Dep. Tr., Feb. 21, 2014) at 118:16-120:6. In the prosecution history, EON specifically amended
 24 the broader limitation of “when” with the narrower limitation of “if” found in the issued claims.
 25 Finally, even had EON preserved a DOE theory on user intervention, this Court recognized that
 26 such a “theory of equivalence would entirely vitiate’ the conditional ‘if’ limitations,” and would

27
 28 ⁸ EON’s infringement contentions likewise only assert that Defendants’ alternatively infringe under the doctrine of
 equivalents with no legal analysis or support. (ECF No. 1021) at Exhibits A-G.

1 fail as a matter of law. (ECF No. 1029 at 21). EON’s unreasonable invocation of DOE is
 2 additional support for an award of attorney fees. *See Cartner v. Alamo Group, Inc.*, 2013-1293,
 3 2013-1314, 2014 U.S. App. LEXIS 6677, *23 (Fed. Cir. Apr. 11, 2014)(citing “bad faith conduct
 4 with respect to the doctrine of equivalents argument” as supporting district court’s finding the case
 5 exceptional under pre-*Octane* clear and convincing standard.)

6 **H. EON Pursued This Case in Bad Faith to Preserve EON’s Other Lawsuits**

7 A further, independent basis for sanctions includes EON’s clear motive in pursuing this
 8 case without regard for the merits and costs to Defendants in order to preserve its litigation in other
 9 courts. In an August 28, 2013 hearing in the *AT&T* matter, EON’s counsel explicitly stated to the
 10 Puerto Rico District Court that it would continue with infringement claims against AT&T under the
 11 ’491 patent until there was a binding judgment in this Court. Nagdev Decl., Ex. 23 (*EON Corp. IP*
 12 *Holdings, LLC v. AT&T Mobility, LLC*, 3:11-cv-1555, (D. P.R.) (ECF No. 412)) at 18:12-19:5.
 13 EON’s counsel also noted that it planned to file a motion for reconsideration before this Court,
 14 “[w]hich will take some time for him to resolve.” *Id* at 19:19- 20:8. While EON did file the
 15 motion for reconsideration, it tellingly did not seek reconsideration of the case dispositive
 16 conditional “if” limitations; (ECF No. 783); despite this Court holding that EON had no basis to
 17 pursue its user intervention theory. (ECF No. 1029 at 8 (“In the accused networks, handsets switch
 18 to [Wi-Fi] even when the handset is able to communicate through [the cellular network], and the
 19 accused networks therefore fall outside the scope of the claims.”)).

20 EON’s transparent plan was to delay judgment in this case so as to delay the impact of this
 21 case on its other pending ’491 Patent matters. Indeed, while it sought delay in this Court, it urged
 22 the District of Puerto Rico to push forward with trial in the *EON v. AT&T* matter. In August 2013,
 23 at a status conference in the *EON v. AT&T* matter, EON argued that the February 2014 trial date for
 24 the case should be maintained, despite the fact that a *Markman* hearing date had not even been set.
 25 Nagdev Decl., Ex. 24 (*EON Corp. IP Holdings, LLC v. AT&T Mobility, LLC*, 3:11-cv-1555, (D.
 26 P.R.) (ECF No. 407)) at 1. On September 10, 2013, EON sought again to push forward with trial
 27 in the AT&T matter in Spring 2014 (despite the fact that a claim construction hearing had not yet
 28

1 been held), even consenting to trial before the assigned magistrate judge in order to accomplish that
 2 goal. (*Id.* at 1-2). These measures were evidently designed to ensure that the AT&T trial took
 3 place before the scheduled date for summary judgment motions in this case. (*Compare* Nagdev
 4 Decl., Ex. 24 (*EON Corp. IP Holdings, LLC v. AT&T Mobility, LLC*, 3:11-cv-1555, (D. P.R.) (ECF
 5 No. 407)) with Nagdev Decl., Ex. 25 (*EON Corp. IP Holdings, LLC v. AT&T Mobility, LLC*, 3:11-
 6 cv-1555, (D. P.R.) (ECF No. 413) and (ECF No. 754)).

7 Even after this Court granted Defendants' summary judgment motion, but while the issue of
 8 the form of judgment remained pending,, EON argued in the AT&T matter in Puerto Rico that "as
 9 a procedural matter, the California court has not yet issued a final judgment, which is a
 10 prerequisite and condition to any applicable collateral estoppel argument" and sought to rely on its
 11 alleged settlement with MSI to explain why judgment would be delayed in this case. (Nagdev
 12 Decl., Ex. 26, *EON Corp. IP Holdings, LLC v. AT&T Mobility, LLC*, 3:11-cv-1555, (D. P.R.) (ECF
 13 No. 456) at 3-4). As this Court is aware, EON in fact did attempt to further delay entry of
 14 judgment, which this Court overruled. (ECF Nos. 1036, 1037).

15 EON's motive to continue this case regardless of its merits in order to delay any impact on
 16 its co-pending litigation supports a finding that this case is exceptional under Section 285 and
 17 merits an award of sanctions under Section 1927. *See Monolithic Power Sys., Inc. v. O2 Micro*
 18 *Int'l Ltd.*, 2011 U.S. Dist. LEXIS 154454, at *18 (N.D. Cal. Mar. 3, 2011) ("Based on its
 19 knowledge of the series of cases discussed above, the Court finds that O2 Micro engaged in a
 20 vexatious litigation strategy that supports finding this case to be exceptional."); *Estate of Blas*, 792
 21 F.2d at 860 (an award of fees under § 1927 is warranted where an attorney in bad faith or
 22 recklessly advances frivolous arguments). Because EON unreasonably continued to pursue this
 23 case against multiple Defendants with no hope but delay, EON and EON's counsel must bear the
 24 costs of that choice.⁹ *See Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1327-28 (Fed.

25 ⁹ During the parties' meet and confer regarding this motion, EON pointed to a recent Central District of California
 26 decision denying a motion for attorneys' fees and sanctions. *See* Nagdev Decl. Ex. 33, *Kaneka Corporation v. Zhejiang*
27 Medicine Co., Ltd. et al., No. 2:11-2389, 10 (C.D. Cal. May 23, 2014). But the *Kaneka* Court based its decision on
 28 finding the plaintiff "presented a **reasonable**, but unconvincing argument for additional discovery in response to
 Defendants' motions for summary judgment." *Id* at 7 (emphasis added). In this case, on the other hand, EON
 unreasonably proceeded in its infringement case despite knowing that the accused handsets and femtocells operate
 exactly opposite to this Court's conditional "if" construction, and rested its entire infringement theory on necessary user

1 Cir. 2013) (upholding a finding of attorneys' fees under the old, more stringent standard where the
 2 patentee "improperly asserted and maintained its positions in the litigation" because "no reasonable
 3 litigant in [the patentee's] position could have expected an [infringement] finding [given a
 4 reasonable claim construction or subsequent *Markman* order.]").¹⁰

5 **I. EON Must Bear the Brunt of Judgment Delayed**

6 Because EON maintained this case despite the case-dispositive *Markman* order, Defendants
 7 were unnecessarily forced to incur substantial costs related to discovery, expert reports, and
 8 summary judgment briefing after the Court's *Markman* order was issued. During that period, each
 9 Defendant incurred fees relating to at least the following categories of activities: (1) the
 10 completion of fact discovery (including document production in response to EON's requests for
 11 production served on October 11, 2013, time spent responding to EON's interrogatories and
 12 requests for admission, preparation of and defending of 30(b)(6) witnesses that were not noticed
 13 until after the Court's issuance of the *Markman* order, time spent responding to discovery motions
 14 filed by EON after the Court's issuance of the *Markman* order, and correspondence with EON's
 15 counsel concerning discovery issues); (2) preparation of expert reports and completion of expert
 16 discovery (including both preparation of Defendants' expert reports and preparation of Defendants'
 17 experts for deposition and preparation for and taking depositions of EON's experts); (3) summary
 18 judgment motion practice; (4) motion practice related to EON's request to amend its infringement
 19 contentions; (5) negotiations with EON concerning its continued pursuit of its infringement claims;
 20 (6) time spent coordinating with other defendants concerning case strategy; (7) time spent
 21 attending and preparing for Court-ordered mediation; and (8) time spent preparing this motion for
 22 fees. Attached hereto are declarations from each Defendant evidencing the timekeeper, timekeeper
 23 rates, timekeeper experience, and total hours worked for each timekeeper from the issuance of the
 24 Court's *Markman* Order, as well as necessary supporting documents under Ninth Circuit law. (See
 25 Declarations of Bryan K. Anderson, L. Norwood Jameson, Fred I. Williams, John J. Cotter, Steve
 26 Moore filed concurrently herewith). The attorneys' fees that Defendants incurred as a result of

27 intervention despite clear instruction from this Court to the contrary.

28 ¹⁰ The Federal Circuit also made clear that "a party...must continually assess the soundness of pending infringement
 claims, especially after an adverse claim construction." *Id.* at 1328.

1 EON's unreasonable behavior are detailed in the attached declarations. *Id.*

2 In addition to awarding Defendants' attorneys' fees, this Court should also sanction EON
 3 by ordering it to pay Defendants' expert witness fees. *See iLor*, 631 F.3d at 1380 (a district court
 4 can award expert fees as part of its inherent power in exceptional cases based upon a finding of bad
 5 faith); *see also Marctec*, 664 F.3d at 921 (same). As indicated above, EON pursued this litigation
 6 post-*Markman* in bad faith, and the only reasonable explanation for EON's behavior is that it
 7 wanted to avoid the preclusive effect this case would have on its other potentially lucrative cases
 8 involving the same patent. Awarding only attorneys' fees for this behavior would be insufficient to
 9 compensate Defendants, particularly where Defendants were forced to incur expert fees as a result
 10 of EON's bad behavior. *See id.* Attached hereto are declarations from each Defendant evidencing
 11 the expenses incurred by each defendant in preparing its invalidity, non-infringement, and damages
 12 reports and in preparing and defending its experts at deposition, as well as supporting invoices.
 13 (See Declarations of Bryan K. Anderson, L. Norwood Jameson, Fred I. Williams, John J. Cotter,
 14 Steve Moore filed concurrently herewith). The expert witness fees that Defendants incurred as a
 15 result of EON's unreasonable behavior are detailed in the attached declarations. *Id.* These fees
 16 were all incurred as a result of EON's continued pursuit of this case in bad faith conduct.

17 Finally, the above facts illustrate that EON's counsel knowingly, recklessly and in bad faith
 18 pursued their infringement theories against Defendants despite the Court's claim construction
 19 ruling in an attempt to preserve its claims in parallel litigations. The Court should require EON's
 20 counsel to personally satisfy Defendants' demands for the excess costs, expenses, and attorneys'
 21 fees reasonably incurred because of EON's attorneys' conduct. 28 U.S.C. § 1927.

22 **IV. CONCLUSION**

23 For the foregoing reasons, Defendants respectfully request this Court to grant Defendants
 24 their attorneys and expert fees in the amount set forth in the attached declarations, which includes
 25 only fees incurred from the date this Court issued the *Markman* order.

1 Dated: May 28, 2014

2 Respectfully submitted,

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4

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1 **CERTIFICATION PURSUANT TO GENERAL RULE NO. 45, SECTION X,**
2 **RE E-FILING ON BEHALF OF MULTIPLE SIGNATORIES**

3 In accord with the Northern District of California's General Order No. 45, Section X(B), I
4 attest that concurrence in the filing of this document has been obtained from each of other
5 signatories who are listed on the signature pages. Pursuant to General Rule No. 45, I shall
6 maintain records to support this concurrence for subsequent production for the Court if so ordered,
7 or for inspection upon request by a party until one year after final resolution of the action
8 (including appeal, if any).

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10 Executed this 28th day of May, 2014, at Palo Alto, California.

11 By: /s/Ashish Nagdev

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